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No. 87-157

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLIED TUBE & CONDUIT CORPORATION,

Petitioner,

—v.—

INDIAN HEAD, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

FREDRIC W. YERMAN
425 Park Avenue
New York, New York 10022
(212) 836-8000

Attorney for Respondent

Of Counsel:

Michael Malina
Randolph S. Sherman
Ira S. Sacks
Richard A. De Sevo
Bert L. Slonim
Donna M. Gerber
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 836-8000

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COUNTERSTATEMENT OF QUESTION PRESENTED

Should this Court invoke its certiorari jurisdiction to determine whether a unanimous Court of Appeals erred in refusing to extend the *Noerr-Pennington* doctrine to immunize from antitrust scrutiny under the Rule of Reason a conspiracy among competitors—motivated, at least in part, by a desire to maintain their hold on a concentrated market—to exclude a competing product from an industry code (and, hence, from the marketplace), where:

(a) The jury found that the conspiracy had "subvert[ed] the consensus standard making process" of the private trade association, thus eliminating the procompetitive benefit that justifies voluntary non-governmental standard making;

(b) The conspiracy was implemented by stacking the association's membership vote with "bodies" who were "instructed" "how to vote" and ordered to remain "nailed to [their] seats" until the agreed-upon exclusion was accomplished; and

(c) The product's exclusion from the code caused direct marketplace injury separate and apart from any injury caused by the code's adoption by organs of state and local government?

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STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

The parents of respondent (whose name was changed to TBG, Inc. after the filing of the complaint) are TBG North America Limited, TBG Holdings, N.V., Favorita Holding Company Limited, Tamara Corporation, and Thyssen-Bornemisza Continuity Trust. Respondent has no non-wholly-owned subsidiaries. Respondent's domestic affiliates are TBG North America Ltd., Agriquip Midwest, Inc., CCL Leasing Corp., Cap Inc., CLSI, Inc., C L Systems, Inc., Computer Library Services International Ltd., Continental Healthcare Systems, Inc., Ball-InCon Glass Packaging Corp., Greenland (Delaware) Inc., Information Handling Services, Inc., TBG Information Systems, Inc., Innotec Group Inc., International Berkefeld-Celle Filter Corp. of USA, Madera Glass Company, Moba USA Inc., Multi-Amp Corporation, Multi Amp Services Corporation, Mokveld Valves Inc., Predicasts International, Inc., Staalkat U.S.A. Inc., TBG Information Co. Inc., Vulcan Petroleum Inc., Vicon Credit Corporation, Vicon Farm Machinery, Inc., and Vicon Southeast, Inc. All of respondent's foreign affiliates are privately held companies.

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RESPONDENT'S BRIEF IN OPPOSITION

The Petition does not present any issue meriting review by this Court, since neither of the reasons advanced to justify granting certiorari arises from the record in this case.

(1) Contrary to petitioner's assertion, the decision of the Court of Appeals does not apply the Sherman Act to political activity with no direct marketplace impact. The conspiracy in question did *not* involve political activity; it entailed a deliberate—and successful—effort by competitors in a concentrated market to subvert the consensus standard making process of a *private* trade association in order to deny marketplace access to a competitive product. Moreover, the jury found that petitioner's conspiracy *did* have a direct impact on the marketplace—a finding expressly affirmed by the Court of Appeals, which denied rehearing, *inter alia*, on that precise issue.

(2) Nor does this record support petitioner's contention that the ruling below will chill any First Amendment right to engage

in good-faith debate in private code-making bodies. Far from good-faith debate, the conspiracy for which Allied was found liable involved anticompetitive *conduct* which, as the jury found, subverted the code-making process and unreasonably restrained trade.

The Court of Appeals, in reinstating a jury finding of an unreasonable restraint of trade violative of the Sherman Act's Rule of Reason, applied settled principles of law and declined to extend the *Noerr-Pennington* doctrine beyond its proper ambit. That eminently correct ruling does not conflict with any decision of this Court or of any court of appeals and does not warrant review by this Court.

STATEMENT OF THE CASE

The Petition correctly states that "[t]he facts giving rise to this case are well stated in the opinion of the Court of Appeals." (Petition ("Pet.") 2). The Second Circuit's decision, however, does not recite all of the pertinent facts material to consideration of the Counterstatement of the Question Presented. Accordingly, we set forth such facts below.

A. The Facts

1. The Parties and Their Products

Petitioner and respondent are manufacturers of products which compete head-on in the marketplace. Carlon, a division of respondent Indian Head, Inc., manufactures and sells various types of electrical conduit and fittings made of polyvinyl chloride ("PVC"). (A. 1554, 508, 515, 517).[1] Defendant Allied Tube and Conduit Corporation ("Allied") is the largest producer of electrical metallic tubing ("EMT")—*i.e.*, steel conduit—in the United States. (A. 1009).

Electrical conduit is a hollow tube that carries insulated wires which transmit electrical current. (A. 906-07). The

1 Citations to the record conform to those in the Petition.

Carlon product involved in this case—electrical nonmetallic tubing ("ENMT")—has a number of significant competitive advantages over steel conduit due to its pliability, its lower installed cost and its lower susceptibility to short circuiting. (A. 518-20, 531-34, 1503 B-C, 1554-55, 1896).[2] In 1980, when Carlon began offering ENMT as a substitute for EMT, it confronted a stable market dominated by five EMT producers, the largest of which was Allied, with a market share of 35% to 40%. (A. 520, 535-36, 990, 1009-10, 1555, 1647, 1669A).

2. The NFPA and the National Electrical Code

The National Fire Protection Association ("NFPA") is a "private, non-governmental . . . voluntary membership organization" barred by law from "attempt[ing] to influence legislation."[3] One of its principal activities is the promulgation, through a process called "consensus standard making," of product standards and codes related to fire protection. (A. 496, 595, 1170-71). As the term implies, NFPA members attempt to reach a consensus, objectively arrived at on the merits, with respect to standards that are then offered to the public. (A. 709, 718, 1170). Although the NFPA encourages new membership "so that it can represent as broad a spectrum as possible," no single interest is supposed to become so large that it "can predominate and make the standard the creature of that interest." (A. 595, 707-10, 756-58, 1193). While there are no prerequisites for voting at the annual meetings at which the standards are adopted, there is an "inherent assumption" that the members voting at the meeting "know what they are

2 The Petition's assertion (Pet. 9) that the parties agreed that "the exclusion of PVC conduit from the 1981 NEC was supported by objective scientific evidence" is misleading. It was stipulated below that there is a substantial body of opinion, including views held by those in both the plastic and steel industries, disagreeing on the relative safety of plastic and steel conduit. As the district court instructed the jury, "[a]ll the jury should assume is that the parties do not dispute that people disagree on the issue and there is an objective basis for a concern for safety." (A. 69).

3 A. 1555; *see* 26 U.S.C. §§ 170(c)(2)(D), 501(c)(3).

doing" based on full disclosure of all relevant information. (A. 711, 1139-40, 1340, 1556).

The NFPA code at issue here is the National Electrical Code ("NEC") which sets standards for electrical systems, including electrical conduit. (A. 496-97, 1556). The NFPA publishes the NEC every third year following a multistep, several-year-long process, ending with a vote by the full membership at the annual meeting. (A. 544-48, 554, 905-06, 1556, 1848-55, 1897). In 1980, a simple majority vote of those members present at the meeting was sufficient to approve or defeat a proposal. (A. 1849).

Following NFPA adoption, in addition to serving as the basis for private decisions that directly affect market competition,[4] the NEC is adopted, in whole, in part or with amendments, by many governmental entities, including state legislatures and administrative boards and county, city and other local governmental bodies. (A. 496-97, 690, 900-01, 1557; *see generally* A. 137-362, 364-453). Because of the NEC's reputation as the product of consensus standard making and the large number of governmental bodies involved, inclusion in the NEC is a practical prerequisite to any product's inclusion in governmental codes. (*See, e.g.*, A. 365, 690, 718, 458-59).

Adoption by organs of government, however, is neither automatic nor routine. (A. 432-53, 903-04). There is significant lobbying at the legislative level. Indeed, approximately one-half of the states that adopt electrical codes do not adopt the NEC verbatim. (A. 433-34). As Allied conceded, the NEC "does not itself have the force of law" and "is not itself legally operative." (A. 1556-57).

3. The Admitted Conspiracy to Exclude ENMT from the Market

Just before the case was submitted to the jury, Allied conceded that it had conspired with, *inter alia*, Republic Steel Corporation ("Republic"), Wheatland Tube Company ("Wheatland"), other EMT competitors and Allied's indepen-

4 *See* pages 10-11, *infra*.

dent sales agents to exclude ENMT from the 1981 NEC by stacking the May, 1980 NFPA meeting. (A. 1397, 18-22). Allied also conceded that it "had a pecuniary or commercial interest in seeing to it that the product was not approved." (A. 77-78). The evidence that compelled these concessions was overwhelming.

a. The Conspiracy's Formation

On September 18, 1978, Carlon submitted to the NFPA a proposal (denominated "Article 331") to include ENMT in the NEC. (A. 1560, 563-70, 1756-59). Following approval by the appropriate technical committees, Article 331 was submitted to the NFPA membership for consideration at the annual meeting to be held in May, 1980 in Boston. (A. 1894-95).

When Allied and the other EMT producers became aware of Article 331, they immediately recognized, as one conspirator later wrote, that it was the "first major battleground for the attack on steel markets by segments of the plastic industry during the 80's." (A. 1634). Fully cognizant of the "severe competitive threat" posed by ENMT (A. 1206), the conspirators agreed to exclude it from the market by rigging the vote on Article 331 at the May, 1980 meeting.[5] Following committee approval of Article 331, an "urgent" meeting of the Steel Rigid Conduit and Electrical Section of the National Electrical Manufacturers Association (the "NEMA Steel Section") was held to discuss the matter. (A. 1641, 1701, 970-71, 1558-59). At that meeting (and another held shortly thereafter), representatives of Allied and its coconspirators agreed that each Steel Section member company would "be asked to provide for the attendance of as many NFPA voting members as possible" at the upcoming meeting, noting that under the NFPA's then-current rules persons only had to be members for thirty days to be

5 A. 991, 1205-06, 1351, 1355, 1511-13, 1563. After a study "in detail" of the adverse effect that Article 331's adoption would have on Allied's sales, Allied's Board of Directors was told that the company would lose 40% of its EMT volume by 1984—a loss which in 1984 alone would amount to $20 million. (A. 992-99, 1002-09, 1650).

eligible to vote. (A. 1561-62, 1703, 1094, 1207-09, 1562-63).[6] For its part, Allied pledged to bring at least 100 people to vote against Article 331. (A. 1708-13, 974, 1563).

The conspirators left nothing to chance. A formal "battle plan" was prepared, calling for, among other things, each participant to "go[ ] all out to have bodies on the floor to vote" at the May meeting and "to contact all steel companies . . . urging them to add new members and to be in Boston to vote." (A. 1708-13, 1634, 1725-29, 1832-34, 1730, 974-77, 1563). As the "battle plan" put it, "[t]he question to ask is: What is it worth to save our conduit business . . . ?" (A. 1708-13).

Allied immediately took steps to recruit and get its "troops" in line. (A. 1029, 1212-13). Beginning in February, 1980, Allied's national sales manager began contacting its independent sales agents—separate companies unaffiliated with Allied—as an additional source for new NFPA votes. (A. 1018-19, 1938, 1515-17, 1562). Allied discussed with them the adverse economic effect that approval of Article 331 would have and assigned them targeted numbers of new members to recruit. (A. 1012-19).

All told, Allied and its coconspirators brought at least 230 voters to the meeting. (A. 1231). Among the 155 persons that Allied alone brought to the annual meeting to vote against Article 331 were its employees, sales agents, the agents' employees, company executives, employees of two of Allied's divisions—neither of which sold electrical products and one of whose businesses was "lawn furniture and things like that"—and the wife of the national sales director. (A. 1566, 1032-34). For the express purpose of "gathering [their] votes," Allied paid all of these individuals' expenses, totalling over $100,000 for membership fees, travel expenses and other costs. (A. 987-88, 1020-21, 1214-15, 1566-67, 1908-14).

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6 It was also agreed that because "[p]roblems regarding restraint of trade are a very real concern," there would not be "direct[ ]" discussion of these problems; instead, future discussions regarding ENMT "must be" limited to the alleged "safety aspects." (A. 1703, 972-73, 1095).

b. The May, 1980 Meeting—The Conspiracy Succeeds

Implementation of the conspiracy to exclude ENMT from the market commenced with a cocktail party in Boston on the night of May 18th. "All Allied salesmen, representatives and personnel" were informed that attendance was "imperative." (A. 1585, 1025-27). Allied's self-described "troops" were given "[c]omplete instructions" on what to do at the meeting, including (1) where to sit, based on a detailed seating chart broken down by "groups," (2) the appointment of "group leaders" responsible for "keep[ing] order among the troops," (3) that "[o]nce the NEC ratification starts" the "troops" were "expected to stay nailed to [their] seats," and (4) that box lunches would be provided "in case the session carries over into the evening—*NO ONE* leaves . . . until after this evening session." (A. 1587, 1593, 1028-36, 1566). The "troops" were explicitly told that "[y]our Group Leader *will instruct you* how the discussion is progressing and *how to vote*." (A. 1593 (emphasis added), A. 1035-37). Representatives of Allied, Wheatland, Republic and another EMT competitor met "to reach a consensus . . . as to the procedures that were going to be followed at the meeting"; and Allied distributed walkie-talkies to the other steel companies to assure that the "troops" voted as instructed.[7]

In accordance with their instructions, the 155 Allied members—sitting in their predesignated "groups"—"stay[ed] nailed to their seats" during the annual meeting. (A. 1221, 1566). Paying "no attention" to the substance of the proceedings, the "troops" had no idea as to the merits of what was at issue. (A. 1106-09, 1177, 1815-21). Thus, even though ENMT's claimed safety risk was the purported reason for Allied's opposition, very few of its voters had any of the technical documentation necessary to follow the proceedings; *nor did a single one of them speak in opposition to Article 331 during the course of the meeting*. (A. 1106-08, 1310-11; *compare* A.

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7 A. 1086-92, 1219-21; *see also* A. 1215-18, 1518-19, 1677, Plaintiff's Trial Exhibit ("PX") 412, A. 1567.

1352 *with* A. 606-18, 1761-80). As one stated when questioned at the meeting as to why, as he put it, he was "instructed to vote to return [Article 331] to committee," "I was just told to come to the meeting and be present when they voted . . . ." (A. 1111-12).

Although Allied's voters paid no attention to the substance of the proceedings, they were careful to follow the conspirators' instructions communicated to them via their "group leaders" by walkie-talkies and "signals"—"thumbs up, yes, thumbs down, no." (A. 1037-40, 1306-09, 1566-67). Two votes were taken on Allied's coconspirator's motion to return Article 331 to committee. (A. 606, 1041-42). The first, a voice vote, was inconclusive. (A. 618, 1774). The second, a standing vote, was taken amidst "a lot of confusion and congestion." (A. 619-23, 1041-43). When the dust settled, the Chair ruled that Article 331 had been defeated by only four votes—394 to 390. (A. 634, 1567). Despite requests by Carlon and others, no recount was permitted under the NFPA's rules, since no one who voted against Article 331 requested one. (A. 627-34, 1775-80). Finally, "[t]o insure that there would not be [any] change" in the outcome, Allied's "troops" were kept in their seats until 2:00 a.m. when the final vote on the complete NEC was taken. (A. 1228-30, 1317-18). Absent the 230 "troops" brought by Allied and its coconspirators to do their bidding (A. 1231), Article 331 would have been overwhelmingly approved.

The subversion of the NFPA's consensus standard making process was the subject of criticism during the meeting itself. (A. 1771-73, 1110-11, 1127-28, 1142-45). After the meeting, there was a "negative reaction" to the conspirators' conduct, including editorials in trade magazines castigating the "mob rule" that had "abuse[d]" the NFPA and turned its "codemaking process . . . into a battleground for establishing commercial preference for competing product types." (A. 1332, 1934-37, 1224-27, 1304). Allied, however, was unrepentant. The only "lesson" that its Director of Public Safety Issues drew from this hostile reaction was that the next time Allied

sought to rig a vote, it should "not [be] so obvious." (A. 1330-31, 1606-09).

Following the defeat of Article 331, Carlon (and the National Association of Home Builders) appealed on the ground that the vote was not based on the "technical merit[s]," was "not representative of the membership of the association and cannot be construed as [a] consensus." (A. 1905-06, 636-37, 642, 1567). The NFPA Board of Directors, eschewing any investigation of the substance of these allegations and viewing the scope of its review as limited to the question of whether the Association's rules had been followed, found that, while the rules had been "circumvented," they had not been violated, and denied the appeal, returning Article 331 to committee "for further study."[8]

4. The Sanders Committee Report

In the wake of the May, 1980 meeting, the NFPA Board of Directors was "concerned . . . very much" about the "circumvent[ion]" of the Association's rules. (A. 1163, 1171-72, 1194-98). As Jack Sanders, its Chairman, testified, the conspirators' "battle plan" was inconsistent with the spirit and intent of the NFPA's consensus standard making procedures. (A. 1173). For it was wholly contrary to the NFPA's goals "for a company that would like to keep a competitive product off the market to register as many of its employees as possible . . . so that they can vote against that competitive product." (A. 1193-94; *see* A. 674-75, 1571).

In order to "combat any potential" for the repeat of "that kind of activity," the NFPA Board appointed a committee headed by Mr. Sanders to review the "stacking" of the 1980 meeting and to take steps "to maintain the integrity of the [Association's] standards." (A. 1163, 1171-72, 1571). After a "review in-depth [of] the entire procedural activities under which we develop our codes and standards," the committee recommended, and the Board adopted, new regulations. (A.

8 A. 638-46, 1164-69, 1177-79, 1181-84, 1186-87, 1835-37, 1568.

1169-70, 1174-75, 1856-75, 1571). These included increasing to 180 days from 30 the minimum time that a person must be an NFPA–member in order to vote at the annual meeting. (A. 1197-98). As Mr. Sanders testified, the specific purpose of this change was "to avoid block voting by special interest groups in the future." (A. 1174, 1197).[9]

5. The Conspiracy's Market Effect

The successful conspiracy to exclude Article 331 from the 1981 NEC had the direct effect of excluding Carlon's product from the marketplace. In addition to the exclusionary impact in those jurisdictions which adopted the NEC as their electrical code and precluded the lawful use of Carlon's product altogether, Carlon was injured by the "stigma"—and Allied's marketing of that stigma—resulting from the wrongful exclusion of ENMT from the NEC even in those jurisdictions where Carlon's innovative and less expensive product could be lawfully used, *i.e.*, jurisdictions which (1) had no electrical code; (2) had adopted the 1981 NEC, but modified it to permit ENMT's use; or (3) later adopted the 1984 NEC, which itself permitted the use of ENMT. This stigmatization of ENMT was successful because of the NEC's reputation as a product of consensus standard making. Thus, it was undisputed that "[t]hird party certifiers of electrical equipment such as Underwriters Laboratories will normally not list and label a product without NEC approval." (A. 1557-58; *see* A. 694-95, 704, 922-23, 1706, 1989). Similarly, many electrical inspectors, contractors and distributors will not use a product absent NEC approval and the UL label, and underwriters will refuse to insure structures that are not built in conformity with the NEC. (A. 556-57, 693-94, 700-01, 1558). And Allied fully capitalized on Carlon's predicament, doing "everything it

9 With the new rules in place, and without opposition by Allied, Article 331 was finally included in the 1984 NEC, but with the limitation that ENMT could be used only in structures up to three stories in height. (A. 672, 674, 1353, 1381, PX-595 pp. 201-03). At its May, 1986 meeting, the NFPA approved a new Article 331 deleting the three-story limitation from the 1987 NEC. Allied's appeals from that approval were denied.

could to make sure that as many people as possible found out about the defeat of Article 331," including advertisements and distribution of documents to "people in the industry" informing them of the defeat.[10]

In short, ENMT's exclusion from the 1981 NEC—the "primary code for the electrical industry in the United States"—effectively excluded it from the marketplace. (A. 1556; *see* A. 696, 704, 800). This adverse market effect flowed directly from the consensus standard making process itself and the public's reliance on the NEC as the purported product of unbiased industry consensus. (*See* A. 719, 916-17). The 1981 NEC gives no hint that it was the product of subversion or that it was adopted on any grounds other than the merits (*see* A. 1917-26); and, needless to say, neither Allied nor its coconspirators informed the public that the Code resulted from a stacked meeting at which the process had been subverted. To the contrary, as noted above, Allied fully exploited the "stigma" that its own conduct brought about throughout the marketplace.[11]

B. The Proceedings Below

1. The Trial

After extensive pretrial proceedings, a bifurcated trial commenced on March 4, 1985 before Hon. John E. Sprizzo and a jury on Carlon's claim that Allied and its coconspirators had "combined and conspired to prevent competition from nonmetallic tubing by excluding it from the 1981 NEC" by "subvert[ing the] . . . NFPA's consensual standards, rules and procedures." (A. 18-22). After four days of deliberation, the jury, in response to special questions, rendered its verdict, finding, *inter alia*, that "Allied's conduct in opposing Article

10 Trial Transcript pp. 2979-89; *see* A. 1454-55.

11 As the above discussion demonstrates, Allied is plainly wrong when it asserts that its subversion "caused Carlon *no* harm," that Carlon "proved damages *only* for injury attributable to legislative enactment of the NEC," and that "the record contains *no* evidence supporting the 'stigma' theory or indicating that Allied 'marketed' the stigma." (Pet. 19-20) (emphasis added).

331 adversely impact[ed] competition," "constitute[d] an unreasonable restraint of trade in violation of the antitrust laws," and was "a substantial or material factor in excluding Article 331 from the 1981 NEC."[12] Among its other findings, the jury concluded that "[r]egardless of whether Allied's conduct violated any of the rules or regulations of the NFPA"—which the jury found it did not—"Allied's conduct subvert[ed] the consensus standard making process of the NFPA" and did not "constitute the least restrictive means of effectively expressing Allied's opposition to the use of ENMT in the marketplace."[13]

At the conclusion of the damages phase of the trial, the court instructed the jury that any award of damages must be limited to those incurred by Carlon as a result of the actions of Allied and its coconspirators "at the May 1980 meeting and [their] marketing of that defeat [of Article 331] in the marketplace."[14] The court went on to instruct the jury that Carlon did

12 A. 474M, 474N, 474K. Under the court's Rule-of-Reason charge, the jury was instructed to consider whether the NFPA's rules were "reasonably designed to secure a consensus with respect to safety of products as they were accepted or not accepted in the electrical code" and whether "the procedures that were followed at the floor meeting in May of 1980 [were] consistent with the spirit . . . of the rules of the NFPA." (A. 1446-47). In finding that Allied's conduct unreasonably restrained trade under that charge, the jury implicitly answered these questions in the negative—findings buttressed by the specific determination that Allied's conduct "subvert[ed] the consensus standard making process of the NFPA." (A. 474G).

13 A. 474F, 474G, 474L. The parties agreed upon the wording of the questions put to the jury. Contrary to petitioner's assertion that the jury did not understand the subversion question (*see, e.g.*, Pet. 18), Allied did not challenge at trial or in its post-trial motion the wording of any of the questions or of the district court's charge relating to subversion.

14 A. 118. Judge Sprizzo charged the jury that:

> [T]he plaintiff's argument is what happened in May 1980 has created a certain stigma on the product which has carried through and that the defendants have attempted to market that stigma in the years which have ensued so that the extent of the damages which it now suffered

not claim, and the jury could not award, damages based on any lobbying activities of Allied. (A. 118). Based upon these instructions, the jury found that "as a proximate result of Allied's unreasonable restraint of trade in violation of the antitrust laws," Carlon lost $3.8 million in profits.[15]

2. The District Court's Oral Decision

In an oral ruling from the bench, Judge Sprizzo held that the *Noerr-Pennington* doctrine "require[d]" that the jury's verdict be set aside. (App. 23a-24a, 25a). The underlying rationale of the court's decision is not entirely clear. On the one hand, the district court suggested that the NFPA functions as a quasi-legislature and that, as a result, Allied's conduct in causing the Association to keep Article 331 out of the NEC constituted petitioning for legislation. (*See, e.g.*, App. 25a-26a, A. 467). On the other hand, the court also expressed a view that once the NEC is adopted by the NFPA it "will almost inescapably be

> are a direct result of what happened in 1980, and that is the plaintiff's claim. *The plaintiff claims [its] damages do result from what happened in May 1980 and not from any conduct of the defendants that they were engaged in other than the marketing of that defeat in 1980 in the years that follow. That's the plaintiff's claim.* (A. 117) (emphasis added).

15 A. 1494, 4740. In light of, *inter alia*, the court's charge, Carlon's and Allied's counsel's opening and closing arguments at the damages phase of the trial, and Allied's stipulation of facts as incorporated in the final *pre*-trial order (A. 117-18, 1479-80, 1485-88, 2627-36, 2678; *see* page 10, *supra*), it is remarkable that Allied could now claim that "Judge Sprizzo did *not* submit the stigma theory to the jury" and that "from complaint through trial openings, summation and verdict" the "*only* theory on which Carlon litigated the case" was that governmental adoption of the subverted NEC "excluded its ENMT product from the market." (Pet. 19, 20) (emphasis in original). If, as Allied argues, Carlon was injured exclusively by legislative enactment of the NEC (Pet. 19), *i.e.*, only in those jurisdictions adopting the NEC, there would have been no need for Allied to have "marketed" the defeat of Article 331; for exclusion from the NEC would *ipso facto* have resulted in exclusion of Carlon's product from the market *in those jurisdictions*. Allied's "marketing efforts" served to put the nail in the coffin in the *remaining* jurisdictions. (*See* pages 10-11, *supra*).

followed by the legislatures of the various states" and, as a result, the entire NFPA standard setting process—including the complained-of concerted conduct—was an attempt by Allied and its coconspirators to persuade state legislatures to adopt their anti-ENMT position. (App. 25a-26a).

3. The Court of Appeals' Decision

On April 22, 1987, the Court of Appeals for the Second Circuit (in an opinion by Senior Circuit Judge Lumbard, joined by Circuit Judges Kearse and Pratt) unanimously reversed, rejecting both of Allied's arguments for antitrust exemption.[16] At the outset, "declin[ing] Allied's invitation to extend *Noerr-Pennington* immunity to lobbying activities directed toward a 'quasi-legislative body' such as the NFPA," the Court recognized that none of the concerns upon which *Noerr*'s holding was based applied to private organizations. (App. 12a). Unlike a government, a private organization is unelected, unaccountable and " 'presumed to be acting primarily on . . . its own behalf.' " (App. 13a-14a, quoting *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 45 (1985)). Thus, "[n]o . . . safeguards [similar to those applicable to governments] exist to prevent a private organization from adopting policies contrary to the interests of the general public—in the instant case, establishing an anticompetitive restraint of trade." (App. 14a). Echoing this Court's decision in *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel, Inc.*, 456 U.S. 556, 570 (1982), Judge Lumbard emphasized that the concern that private standard setting organizations "might operate contrary to the public interest becomes particularly acute in view of their importance within the economy." (App. 15a). Agreeing with the Fifth Circuit's analysis in *Feminist Women's Health Center, Inc.* v. *Mohammad*, 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979), the Court concluded that the fact that state and local governments may—but are

16 The Court's decision is officially reported at 817 F.2d 938.

not required to—adopt the NEC "does not transform the NFPA into a governmental organ." (App. 16a).

Turning to Allied's second argument—that its subversion of the standard making process was protected as an "indirect petition"—the Court held that "Allied's behavior, which itself caused independent antitrust injury to Carlon, should not be excused merely because its actions also indirectly influenced state and local governments." (App. 17a). Again agreeing with the view of the Fifth Circuit,[17] the Court differentiated between the "submission of a group's recommendations to the government"—which *is* protected—and "the antecedent conduct which generated those recommendations"—which is *not* protected. (App. 17a). Nor was the Court "swayed by Allied's contention that . . . the only effective method of influencing . . . governments is through the NEC amendment process." (App. 18a). As Allied conceded, it had the opportunity to lobby the governments and, indeed, "over half the states and cities [that Allied] polled either amended the NEC before adopting it or refused to adopt it at all." (App. 18a-19a). The Court of Appeals likewise rejected Allied's argument that denial of antitrust immunity "would be inconsistent" with this Court's ruling in *Noerr* since, unlike the railroads' publicity campaign in that case, Allied's subversion did not "constitute 'political activity' conducted within the 'political arena.' " (App. 19a). "Simply put, Allied's conduct did not constitute petitioning of the government within the meaning of *Noerr-Pennington*; rather, its conduct was a subversion of the legitimate purposes of the NFPA." (App. 17a).[18]

17 *See* Feminist Women's Health Center v. Mohammad, *supra*, 586 F.2d at 545; United States v. Southern Motor Carriers Rate Conference, Inc., 702 F.2d 532, 542 (5th Cir. 1983), *reaff'g en banc* 672 F.2d 469 (5th Cir. 1982), *rev'd on other grounds*, 471 U.S. 48 (1985).

18 The Court of Appeals also rejected Allied's contention that "its conduct did not constitute an unreasonable restraint of trade." (App. 19a-20a). First, the Court "refuse[d] to permit [Allied] to use its literal compliance with [the NFPA's] rules as a shield to protect [its conspiracy] from

Following the panel's decision, Allied petitioned the Second Circuit for rehearing and rehearing *en banc*, arguing, *inter alia*, that the Court of Appeals had misconceived the trial record in concluding that Carlon's damage award was based on injury stemming from the direct marketplace effect of Allied's conduct. (*See* Petition for Rehearing at 7-13). On June 11, 1987, that petition was denied, no judge who heard the appeal and no active judge of the Court "ha[ving] requested that a vote be taken thereon."

REASONS FOR DENYING THE WRIT

The Petition's effort to implicate the doctrine of *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and its progeny, and thereby raise issues in this case worthy of review by this Court, proceeds on two critical but manifestly false assumptions: (1) that the case involves "political activity that has no direct market place impact"; and (2) that application of the Sherman Act to Allied's conduct "will chill good-faith debate in private code-making bodies . . . ." (Pet. 12). Since both assumptions are demonstrably incorrect, the Petition collapses like a house of cards.

This case does not concern political activity of the sort exempted from antitrust scrutiny by the *Noerr-Pennington* doctrine. Nor will the imposition of Sherman Act liability for the blatantly anticompetitive conspiracy proved—indeed, admitted—here chill any good-faith debate in private code-making bodies.

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antitrust liability." (App. 21a). Nor did the Court "find any merit" in Allied's reliance on the existence of objective scientific evidence to support the exclusion of Carlon's product from the NEC since the " 'objective validity' of a restraint has never been a defense to an antitrust charge." (App. 22a).

I. This Case Does Not Involve "Political Activity" with No Direct Market Impact.

In *Noerr*, this Court held that the antitrust laws do not apply to "activities compris[ing] mere solicitation of governmental action with respect to the passage and enforcement of laws." 365 U.S. at 138.[19] Put another way, the Sherman Act does not prohibit conduct which seeks to induce the government to take action in restraint of trade, since any other rule would impinge on constitutionally protected rights of free speech and petition. But when private conduct itself unreasonably restrains trade by directly impacting the marketplace, *Noerr* and the policies it reflects are not pertinent and the antitrust laws apply with full vigor.

Petitioner, apparently aware of this limitation on *Noerr*'s scope, strives to bring this case within the doctrine by asserting that Allied's conduct was solely political and had no direct marketplace impact. (Pet. 12). The record, however, is clear that the conspiracy to exclude Carlon's product had a direct market impact separate and apart from any action by organs of state or local government with respect to the adoption of the NEC. (*See* pages 10-11, *supra*).

As the Court of Appeals specifically noted (App. 17a), "Allied's behavior . . . itself caused independent antitrust injury to Carlon . . . ," a conclusion that follows inexorably from the jury's finding that Carlon suffered compensable

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19 Petitioner takes issue with the Court of Appeals' treatment of the *Noerr* doctrine as an "exemption" from the antitrust laws to be construed narrowly. (Pet. 12). Petitioner's semantic quibbling takes it nowhere. As Justice Brennan noted in *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 399 (1978), the doctrine is one of "implied exclusion from coverage of the antitrust laws" and is subject to a "presumption against repeal by implication." Indeed, as the Court there pointed out, the doctrine has been "unavailing to prevent antitrust enforcement which, though implicating [the] fundamental policies [underlying the doctrine,] was not thought severely to impinge upon them." *Id.* at 400. In this case, the policies underlying the *Noerr* doctrine are not implicated at all because Allied's conspiracy in unreasonable restraint of trade in no way entailed the solicitation of governmental action.

injury arising from the stigma of not obtaining NFPA approval of its product and Allied's marketing of that stigma. (App. 9a n.3).[20] Unable to square its *Noerr* theory with that critical fact, petitioner would have this Court review the Court of Appeals' decision with respect to the adequacy of the trial record to support the jury's finding.[21] That finding knocks the prop out from under the Petition's effort to raise a significant *Noerr* issue here. For, on Allied's own statement of the issue it seeks to present, its anticompetitive conduct *did* have a "direct marketplace impact," and that alone disposes of the *Noerr* claim.

Nor did the conspiracy in this case comprise "mere solicitation of governmental action" within the meaning of *Noerr*. Allied's conspiracy was a classic combination in unreasonable restraint of trade, not an effort to persuade government to act. The NFPA—a concededly "private, non-governmental . . . organization" (A. 1555)—is not an organ of government; and subverting its consensus standard making process was not governmental petitioning.

In marked contrast to the concerted publicity campaign immunized in *Noerr*, Allied's conspiracy to exclude Carlon's product from the marketplace by excluding it from the NEC was a restraint of trade squarely within antitrust's mainstream. In *Noerr*'s language, it was "characterized by an express . . . agreement . . . that the participants will jointly . . . help one another to take away the trade freedom of others . . . ." 365 U.S. at 136. As this Court noted in *American Society of*

20 In *Noerr*, by contrast, the private truckers' only injury was concededly caused by the Governor's veto of legislation. 365 U.S. at 130.

21 Thus, petitioner argues that "Allied's vote packing and other activity at the NFPA meeting . . . caused Carlon no harm. Carlon suffered injury only when state and local legislatures enacted the NEC without Article 331." (Pet. 19). The record is directly to the contrary (*see* pages 10-11, *supra*), as the Court of Appeals held in reversing the grant of judgment n.o.v. Indeed, Allied focused its petition for rehearing on this very issue—a petition the Court unanimously rejected. In any event, this Court "do[es] not grant certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925).

Mechanical Engineers v. *Hydrolevel Corp.*, 456 U.S. 556, 571 (1982), "a standard setting organization like ASME can be rife with opportunities for anticompetitive activity . . . ." Allied and its cohorts seized that opportunity to hamper their competitor's access to the marketplace. In *Hydrolevel*'s words, Allied "successfully used its position within [the NFPA] in an effort to thwart [Carlon's] competitive challenge." *Id.* at 562. It is inconceivable that Congress intended to shield such conduct from Sherman Act scrutiny solely because some state legislatures and municipal bodies decided to adopt the Code that Allied utilized to further its anticompetitive scheme.

The Court of Appeals' refusal to extend *Noerr* immunity to lobbying activities directed towards a so-called "quasi-legislative" body properly maintained the doctrine's limited applicability to true governmental petitioning. (*See* App. 12a). The NFPA, while possessing very substantial power to affect the economic well-being of companies attempting to market products covered by the codes it adopts, is not an organ of government and has not been delegated any governmental authority.[22] As this Court has noted, "[w]e may presume, absent a showing to the contrary, that [a governmental organ] acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf." *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 45 (1985). For that reason, concerted efforts to persuade private groups to take anticompetitive action do not constitute the type of political petitioning the *Noerr* doctrine excludes from antitrust scrutiny. *See, e.g.*, *Feminist Women's Health Center, Inc.*, v. *Mohammad*, 586 F.2d 530, 542 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979) (communications within hospital staff "as a matter of law unprotected [under *Noerr*]"; *United States* v. *Johns-Manville Corp.*, 259 F. Supp. 440, 452-54 (E.D. Pa.

22 Significantly, the NFPA itself has eschewed any such role by stating that it "is *not* an administrative arm of any state or local jurisdiction . . . ." (Decision of NFPA Board of Directors on Appeal of Allied Tube and Conduit Corp., Sept. 26, 1986, p. 8) (emphasis in original).

1966) (communications before private standard setting association not *Noerr* protected).[23]

As for the Petition's assertion that Allied's conduct here was nothing more than an effort to bring "indirect influence" to bear on state legislatures (Pet. 13), it is both factually and legally incorrect. As a matter of fact, petitioner's statement that "lobbying within the code-making body is the *only* effective way to influence ensuing legislation" (Pet. 11; emphasis added),[24] is contrary to the record, as both the district court[25]

23 *See also* MCI Commun. Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1159-60 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); United States v. Southern Motor Carriers Rate Conference, 702 F.2d 532, 542 (5th Cir. 1983), *reaff'g en banc* 672 F.2d 469, 477 (5th Cir. 1982), *rev'd on other grounds*, 471 U.S. 48 (1985); Mid-Texas Commun. Sys., Inc. v. American Tel. & Tel. Co., 615 F.2d 1372, 1382 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980); Litton Sys. Inc. v. American Tel. & Tel. Co., 700 F.2d 785, 807 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984); Ashley Meadows Farm, Inc. v. American Horse Shows Ass'n, 1983-2 Trade Cas. (CCH) ¶ 65,653, at 69,352-53 (S.D.N.Y. 1983).

The three district court decisions the petitioner cites as reaching a conclusion opposite to that of the Court of Appeals here all treated the standard setting organization as the equivalent of an organ of government for *Noerr* purposes. Sessions Tank Lines, Inc. v. Joor Mfg., Inc., 1986-1 Trade Cas. (CCH) ¶ 66,989 (C.D. Cal. 1986), *appeal pending*, No. 86-6208 (9th Cir.); Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp., 573 F. Supp. 833 (N.D. Ill. 1983); Rush-Hampton Indus. v. Home Ventilating Inst., 419 F. Supp. 19 (M.D. Fla. 1976) (Pet. 15). This view misconstrues the essence of the right to petition underlying *Noerr*, as the Court of Appeals properly explained. (App. 15a-17a). In any event, those decisions are plainly distinguishable and in no way conflict with the decision below. (*See* page 23 n.30, *infra*).

24 Petitioner makes the same incorrect assertion when it states that "*the* effective route to Allied's goal was via the NFPA." (Pet. 13) (emphasis added).

25 "[T]here is obviously an opportunity to change the mind of the legislature and . . . there is an opportunity for the defendant and the plaintiff to lobby at that level . . . ." (App. 26a). And the record is plain that Allied availed itself of that opportunity. (A. 1204, 1322-29).

and the Court of Appeals[26] expressly noted. And, as a matter of law, to suggest that concerted subversion of the NFPA's standard making process was merely a political effort to persuade state and local governments to adopt the Code would mean that the Sherman Act could never be applied to standard setting conspiracies, so long as some governmental organ ultimately adopted the agreed-upon standards.[27]

It is most significant that, in finding that Allied's conduct unreasonably restrained trade, the jury—pursuant to the district court's instruction—found that the conspiracy's anticompetitive effect outweighed whatever procompetitive justification the standard setting process may have had. To immunize conduct that the fact finder determined had a net anticompetitive impact in the marketplace solely because the code produced by the conspiracy later was adopted by some—though

26 "Nor are we swayed by Allied's contention that, because of the heavy reliance placed upon the NEC by various governments, the only effective method of influencing these governments is through the NEC amendment process. Allied's own survey shows that over half the states and cities polled either amended the NEC before adopting it or refused to adopt it at all. As the district court acknowledged, 'there is obviously an opportunity to change the mind of the legislature and . . . there is an opportunity for the defendant and the plaintiff to lobby at that level . . . . ' " (App. 18a-19a).

27 Needless to say, the Sherman Act's Rule of Reason has been consistently applied to standard-setting conspiracies. *E.g.*, ECOS Elec. Corp. v. Underwriters Laboratories, 743 F.2d 498, 502-03 (7th Cir. 1984), *cert. denied*, 469 U.S. 1210 (1985); Consolidated Farmers Mut. Ins. Co. v. Anchor Sav. Ass'n, 1980-2 Trade Cas. (CCH) ¶ 63,530, at 76,843 (10th Cir. 1980), *aff'g* 480 F. Supp. 640, 648-56 (D. Kan. 1979); E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178, 185-88 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973); Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n, 261 F. Supp. 154, 158 (D. Or. 1966), *aff'd*, 399 F.2d 155 (9th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969); Roofire Alarm Co. v. Royal Indemnity Co., 202 F. Supp. 166, 169-70 (E.D. Tenn. 1962), *aff'd without opinion*, 313 F.2d 635 (6th Cir.), *cert. denied*, 373 U.S. 949 (1963).

The Federal Trade Commission has also issued Administrative Opinions and Rulings proscribing standardization or certification programs that have the purpose or effect of lessening competition. *See, e.g.*, 16 C.F.R. § 15.457(e) ¶¶ 1-3 (1986).

not all—state and local governments would effectively eliminate any antitrust review of private standard making. The Court of Appeals, in accord with the *amicus curiae* views of both antitrust enforcement agencies, properly declined to expand the *Noerr* doctrine to reach so extreme a result; and there is no reason for this Court to review that eminently sound conclusion.[28]

II. Imposing Antitrust Liability for Allied's Concerted Subversion of the NFPA's Consensus Standard Making Process Will Not Chill Good-Faith Debate in Standard Making Bodies.

In attempting to manufacture a "special and important reason" for grant of the writ,[29] Allied asserts that application of the Sherman Act to its conduct "will chill good-faith debate in private code-making bodies" in violation of the First Amendment. (Pet. 12). Again, petitioner puts a question not presented by this record. The decision below does not limit anyone's right to debate or express an opinion as to the safety or suitability of any product on any occasion. Allied's conspiracy involved far more than the exercise of any First Amendment right. No amount of rhetoric can transform this vote-packing conspiracy—a "battle plan" which enlisted hundreds of know-nothing "bodies" with "instructions" on how to vote—into the "expression" of "opinion" or "debate" or "persua[sion]." (Pet. 11, 17, 12, 18). Allied's protestations of free speech have a hollow ring in light of the fact that not one of the conspirators' executives or "troops" spoke at the May, 1980 meeting in opposition to Article 331. It is fatuous to

28 Petitioner's effort to analogize this case to *Noerr* itself is unavailing. (*See* Pet. 14-15). The advertising campaign in *Noerr* was merely part of a general effort to elicit public support for the railroads' lobbying efforts. Here, in sharp contrast, Allied's actions at the NFPA were entirely outside the political arena, involving no contacts with government or appeals to the public to support direct lobbying efforts. Indeed, it is undisputed that the NFPA itself did not engage in lobbying efforts; nor could it, in light of its status as a charitable organization under the Internal Revenue Code. (*See* page 3 n.3, *supra*).

29 U.S. Sup. Ct. R. 17.1.

suggest that application of the Sherman Act to Allied's conspiracy to subvert the NFPA's processes will chill "good-faith" debate by anyone.[30]

There is simply no substance to the Petition's effort to cloak Allied's conduct in the First Amendment. "Where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests." *City of Los Angeles* v. *Preferred Communications Inc.*, 106 S. Ct. 2034, 2038 (1986), citing *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968). As this Court established in *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623 (1984), "[t]he right to associate for expressive purposes is not . . . absolute." Rather, "[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id. Accord, Board of Directors of Rotary International* v. *Rotary Club*, 107 S. Ct. 1940, 1947-48 (1987). Here, even if—contrary to the record—one were to view Allied's conspiracy as, to some extent, an association "for expressive purposes," applying the Sherman Act to it would cause only an "incidental abridgment" of Allied's First Amendment right to expressive association "no greater than is necessary to accomplish the [Sherman Act's] legitimate purposes." *Roberts* v. *Jaycees*, *supra*, 468 U.S. at 628. *See California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 514-15 (1972) ("It is well settled that First Amendment rights are not immu-

30 Allied's conduct distinguishes this case from the district court decisions on which it relies because there was no subversion of the consensus standard making process in any of those cases. *See* Sessions Tank Lines, Inc. v. Joor Mfg. Inc., *supra*, 1986-2 Trade Cas. at 62,065; Rush-Hampton Indus. v. Home Ventilating Inst., *supra*, 419 F. Supp. at 23-24; Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp., *supra*, 573 F. Supp. at 836. It is noteworthy that Allied, which was the plaintiff in *Wheeling-Pittsburgh* and which already had been sued by Carlon, elected not to appeal the district court's decision granting *Noerr* protection to concerted activity before the NFPA—a conclusion which Allied had argued to that court "would establish a dangerous precedent." (Memorandum of Law of Allied, filed May 20, 1980, at 11-12).

nized from regulation when they are used as an integral part of conduct which violates a valid statute"), citing *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).[31]

That Allied's conspiracy was not constitutionally protected speech is most apparent when one considers the consequences of a contrary result. No one could seriously contend that the First Amendment would bar legislation by Congress or a state legislature specifically designed to protect the public from the anticompetitive consequences of the conduct demonstrated on this record. Surely, if a state may constitutionally proscribe truthful advertising of lawful conduct[32] and the NLRB may constitutionally prohibit a truthful request to the executive to enforce a valid law,[33] then Congress can constitutionally prohibit trade association members from combining to subvert consensus standard making by stacking membership meetings and causing the added voters to cast their ballots on instruction with no regard for the merits, all in order to keep a new, better or more economical product out of an industry code and, thus, off the market.

To apply *Noerr*'s antitrust exemption to the egregious subversion of consensus standard making involved in this case would, as a practical matter, remove the Sherman Act's protection from all aspects of the standard making process whenever the resulting standards are ultimately adopted by some organ of government. Since there are many thousands of privately promulgated standards covering a vast array of products, many of which are adopted in whole or in part by organs of

31 In *Giboney*, in an opinion by *Noerr*'s author, Justice Black, this Court unanimously held that a state could constitutionally prohibit, under its general prohibition of conspiracies in restraint of trade, a union's peaceful and truthful picketing. *Cf.* National Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679, 697 (1978) (ban on standard making organization's expressing "opinion [or] policy statement . . . implying that competitive bidding is unethical" is constitutional).

32 Posadas De Puerto Rico Assocs. v. Tourism Co., 106 S. Ct. 2968, 2976-80 (1986).

33 Sure-Tan Inc. v. NLRB, 467 U.S. 883, 894-97 (1984).

government, application of the *Noerr* doctrine to legitimize Allied's conspiracy would enable members of private organizations that this Court has recognized are "rife with opportunities for anticompetitive activity"[34] to seize such opportunities in order to injure their rivals and deprive the public of new, innovative and more economical products.

But that is not all. It would also undermine the credibility of standard making throughout the economy (and thus deprive the public of its benefits), since the public could not know whether the standards promulgated by trade associations are truly the product of a "consensus" on the merits, or whether, as here, they are simply the result of economically motivated, private combinations of competitors who have subverted the standard making process.

In this regard, Allied's protestations that its subversion of the standard making process to exclude ENMT was motivated by a concern for safety are beside the point. (*See* Pet. 14-15). For, as this Court held in *FTC* v. *Indiana Federation of Dentists*, 106 S. Ct. 2009 (1986), the belief that a restraint of trade is lawful because it allegedly prevents consumers from making "unwise and even dangerous choices" is " 'nothing less than a frontal assault on the basic policy of the Sherman Act.' " *Id.* at 2020, quoting *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 695 (1978). Even assuming the best of motives—although Allied's motive to save its conduit business from competition was conceded here (*see* page 5, *supra*)—if one may rig a code to *ex*clude an unsafe product, one may equally rig a code to *in*clude one.[35]

34 American Soc'y of Mech. Eng'rs v. Hydrolevel, *supra*, 456 U.S. at 559, 571.

35 Allied's repeated reliance on the fact that its conduct did not violate the NFPA's rules is misplaced (*see* Pet. 11, 16, 20), for the Sherman Act "is its own measure of right and wrong." Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49 (1912). *See also* National Soc'y of Prof. Eng'rs v. United States, *supra*, 435 U.S. at 688. Plainly, if the rules or by-laws of a trade association, or the abuse of such rules, may contravene the Sherman Act, then the absence of a rule cannot shelter conduct that unreasonably

It would constitute a supreme irony to invoke the very factor that makes standard making organizations' potential for inflicting anticompetitive harm so great—the influential role they play in the adoption of standards by governmental entities—as a basis for providing them and their members a blanket antitrust immunity. The *Noerr* doctrine—narrowly crafted to preserve the right to petition the *government*—is not so perverse as to license combinations of competitors to deprive the public of new and economical products by subverting *private* industry codes. Nothing in the Court of Appeals' opinion infringes Allied's or anyone else's right to petition. The only conduct that the decision will "chill" is conspiracies, such as Allied's, that exclude rivals from the marketplace by subverting private standard making proceedings, thus "impair[ing] the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal costs of providing them." *FTC* v. *Indiana Federation of Dentists*, *supra*, 106 S. Ct. at 2018. The sparing exercise of this Court's certiorari jurisdiction is not warranted to review a decision which correctly refused to accord such anticompetitive conduct blanket Sherman Act immunity through an unsound extension of the *Noerr* doctrine.

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restrains trade. *See*, *e.g.*, Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332 (1982); National Soc'y of Prof. Eng'rs v. United States, *supra*, 435 U.S. at 692-96; Associated Press v. United States, 326 U.S. 1, 14-19 (1945); American Soc'y of Mech. Eng'rs v. Hydrolevel, *supra*, 456 U.S. at 570-74.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition should be denied.

Dated: August 21, 1987
New York, New York

Respectfully submitted,

FREDRIC W. YERMAN
425 Park Avenue
New York, New York 10022
(212) 836-8000

Attorney for Respondent

Of Counsel:

Michael Malina
Randolph S. Sherman
Ira S. Sacks
Richard A. De Sevo
Bert L. Slonim
Donna M. Gerber
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 836-8000

PROOF OF SERVICE

I, Fredric W. Yerman, attorney for Respondent herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 21st day of August, 1987, I caused to be served by hand three copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari on Marvin E. Frankel, Kramer, Levin, Nessen, Kamin & Frankel, 919 Third Avenue, New York, New York 10022. I further certify that all parties required to be served have been served.

Dated: August 21, 1987

Fredric W. Yerman
425 Park Avenue
New York, New York 10022

(212) 836-8000

Attorney for Respondent